IN THE HIGH COURT OF DELHI AT NEW DELHI

MAC APP. NO.202/2004

Judgment reserved on: November 02, 2007

Judgment delivered on:20.12.2007

New India Assurance Co. Ltd. .....Appellant
Through: Mr.Deepak Mallik, Advocate.

versus

Smt. Surekha & Ors. ..... Respondents
Through: Mr. I.S. Kapur, Advocate for respondent Nos.1 & 2.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J.

The present appeal is preferred against the award dated 6.1.2004 passed by Motor Accident Claims Tribunal in Suit Nos. 1836/98 and 276/99, whereby the Tribunal awarded a sum of Rs. 3,74,000/- along with interest @ 9% per annum from the date of institution of the petition i.e., 9.1.1999 till its realisation.

The brief facts of the present case are as follows:

The deceased Sh. Raj Kumar Bhasin aged 26 years met with an accident on 15.11.98 while driving his two-wheeler scooter bearing registration no. DL-4S-R0829 on being hit by a tanker bearing registration no. DEG 4730 near Subroto Park red light at Rao Tula Ram Marg, New Delhi, resulting into his death. A claim petition was filed on 9.1.99 and award was made on 6.1.2004. Aggrieved with the said award present appeal is preferred by the appellant insurance company.

The main grievance of the appellant

insurance company is that the tribunal has not granted recovery rights to the insurer. Mr. Deepak Mallik, counsel for the appellant contended that the the owner and driver were proceeded ex parte by the Tribunal and the driver was having a fake driving licence at the time of driving the vehicle, therefore, had the owner and driver of the offending vehicle been appearing, it would have been proved beyond reasonable doubt that there was breach of conditions of policy as the licence was fake on which the driver was driving the offending vehicle. The counsel further urged that the Tribunal failed to appreciate the fact that both, the owner and the driver, deliberately failed to appear before the Tribunal and therefore an adverse inference should have been drawn against the owner and the driver. The counsel has placed reliance on the following judgments in support of his contentions:

1. United India Insurance Co.Ltd. Vs. Lehru &

Ors.-2003(5) SRJ 351 (SC)

2. National Insurance Co.Ltd. Vs. Swaran Singh-2004 ACJ 1 (SC)

3. New India Assurance Co.Ltd. Vs. Sanjay Kumar & Ors.-MAC APP.No. 28/2005(Decided on 17.4.2007) (Delhi High Court.)

Per contra, Mr.I.S. Kapur, counsel for respondent nos. 1 & 2 has vehemently refuted the contentions of counsel for the appellant. The counsel maintained that the onus to prove that the owner had the knowledge that the driver had a fake licence was on the insurer, which the insurer failed to prove, therefore, the Tribunal rightly denied recovery rights to the insurer. The counsel has relied on the following judgments in support of his contentions:

1. United India Insurance Co.Ltd. Vs. Lehru & Ors.-2003(5) SRJ 351 (SC)

2. New India Assurance Co., Shimla Vs. Kamla &

Ors. -2001 (4) SCC 342

3. Skandia Insurance Co. Ltd. Vs. Kokilaben Chandrawardan-1987 (2) SCC 654

4. National Insurance Co.Ltd. Vs. Swaran Singh-2004 ACJ 1 (SC)

5. Oriental Insurance Co.Ltd. Vs. Aswinder Singh & Ors.-2007 ACJ 2250(P&H)(DB)

6. National Insurance Co.Ltd. Vs. Bhagwati Devi & Ors.-2007 ACJ 2124(Del)

7. Narcinva V. Kamat & Anr. Vs. Alfredo Antonio Doe Martins & Ors.-1985 ACJ 397 (SC)

I have heard learned counsel for the parties and have perused the records.

Perusal of the award shows that the Tribunal has not given recovery rights to the appellant insurance company on the ground that the appellant insurance company has failed to prove on record that the owner of the offending vehicle had the knowledge of the said

fact of driver's possessing the fake licence. The Tribunal in its finding has observed that in the deposition of the witness produced by the insurance company, he failed to state that the insured/owner of the offending vehicle had knowledge about the fake driving licence and still he permitted the driver to drive the vehicle in question. The Tribunal further observed that in the deposition of the witness of the insurance company he also failed to state that there was a breach of terms and conditions of the policy on the part of the driver and owner of the offending vehicle. It is no doubt true that in order to claim complete exoneration from any liability the onus lies on the insurer of the vehicle to prove that there is a breach in the terms and conditions of the policy, and once such breach is established, then only, the insurance company cannot be held liable to satisfy the judgment or award against any person in respect of

third party risk as envisaged under Section 149 (2) of the Motor Vehicles Act.

In the facts of the present case, the appellant insurance company has duly proved on record to show that Shri Rohtash, driverof the offending vehicle i.e., respondent no.1 was in possession of a fake driving licence. The moot question which would arise is that once the insurance company has discharged its onus of proving the said fact of the driver not holding a valid driving licence or that the driver was in possession of a fake licence then still the insurer can be deprived from claiming the recovery rights from the insured. In catena of judgments the Hon'ble Supreme Court has taken a view that it is only when in the evidence it is proved that the owner had no knowledge about the said fake licence being in possession of the driver of the offending vehicle, then the owner cannot be held liable to satisfy the award. However, the question

arises that in a case where the owner of the offending vehicle does not choose to contest the case and enter the witness box to depose the said fact then, can the insured still be held liable to satisfy the award without even giving the insurer the recovery rights. In my considered view, in a case where the insurer is able to satisfy the court that either there is no licence or the licence is fake one or the licence was not valid as on the date of the accident then in the absence of any evidence from the side of the owner to plead and prove ignorance on his part about such a fact, the insurer of the vehicle cannot be deprived of the recovery rights to ultimately claim the award amount from the owner of the offending vehicle. Non appearance of the owner and driver of the offending vehicle and lack of any evidence on their part has to be at their peril and not at the peril of the insurer of the vehicle.

In the matter of **Narcinva V. Kamat & Ors.**

(Supra), as relied upon by the counsel for the respondent the facts were totally dissimilar, as in that case not an iota of evidence was led by the insurance company to prove that the driver did not possess the valid driving licence to drive the vehicle. In such case the Apex Court has held that the insurance company has failed to prove that there was a breach of terms of the contract of the insurance. The said judgment cited by the counsel for the respondent can be of no help to him in the facts and circumstances of the instant case. The other judgments as cited by the counsel for the respondent are also not applicable to the facts and circumstances of the present case.

In the light of the above discussion, the present appeal is allowed limited to the extent of the finding of the Tribunal denying the appellant recovery rights to recover the award amount from the owner of the offending vehicle. The appellant being the insurer

of the offending vehicle is allowed to recover the award amount from the respondent owner of the offending vehicle.

With these directions, appeal stands disposed of.

December 20, 2007 **KAILASH GAMBHIR**
JUDGE